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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1247

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–10a) is reported at 405 F. 2d 159. The Board's decision and order (Pet. App. 15a–34a) are reported at 154 NLRB 839.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a–14a) was entered on January 10, 1969. On February 28, 1969, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to April 10, 1969, and the petition was filed on that date.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a clause of a collective bargaining agreement in the construction industry which permits the union to terminate the entire agreement if the general contractor subcontracts work to a "non-union" contractor falls outside the protection of the construction industry exemption to Section 8(e) of the National Labor Relations Act and therefore violates that Section's proscription against secondary boycott agreements.

2. Whether the union violated Section 8(b)(4)(ii)(A) and (B) of the Act, by threatening to terminate all contractual relations with the general contractor unless he ceased doing business with a non-union subcontractor.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, are set forth in Appendix C of the petition, pp. 35a–36a.

STATEMENT

The Ets-Hokin Corporation is a general and electrical contractor doing business in several states (Pet. App. 2a, R. 46; Tr. 31).[1] At the time this controversy arose, Ets-Hokin had entered into collective bargaining contracts with various local unions of the

[1] "R" refers to Volume I of the certified record in the court below, designated "Pleadings"; "Tr." refers to Volume II, containing the transcript of the hearing before the Board.

International Brotherhood of Electrical Workers ("IBEW") containing the following clause or one substantially similar (Pet. App. 2a, R. 118, 46–47, 68–72; Tr. 128–131):

> Local Union #—— is a part of the International Brotherhood of Electrical Workers and any violation or annulment of working rules or agreements of any other Local Union of the IBEW, or the subletting, assigning, or transfer of any work in connection with electrical work to any person, firm, or corporation not recognizing the IBEW as the collective bargaining representative on any electrical work in the jurisdiction of this or any such Local Union by the Employer, will be sufficient cause for cancellation of this agreement, after the facts have been determined by the International Office of the Union.

In October 1962, Ets-Hokin contracted with a non-IBEW subcontractor, the Rose Construction Company, Phoenix Division ("Rose"), for work on a construction project in Glen Canyon, Arizona (R. 47; Tr. 87). Shortly thereafter, Rose executed a collective bargaining agreement with a local of the International Union of Operating Engineers, recognizing it as the exclusive bargaining agent and sole source of personnel for the Glen Canyon project (Pet. App. 2a–3a, R. 47; Tr. 282, IBEW Ex. 5).

During January–March 1963, IBEW and its Local 769, petitioners here, complained to Ets-Hokin about the subcontract to Rose (Pet. App. 3a, R. 48–49, 51–52; Tr. 25–29, 35–39, 59, 63, 82–89–98, G.C. Exhs. 4, 8). Petitioners repeatedly threatened termination

of all IBEW contracts with Ets-Hokin[2] unless Rose were removed from the Glen Canyon project, pointing to the provision in the contracts authorizing termination for subcontracting to a non-IBEW subcontractor (Pet. App. 3a, R. 48–49, 51–52; Tr. 25–29, 35–39, 63, 94–96, G.C. Exh. 8). Ets-Hokin sought to compromise the dispute, but petitioners rejected its proposals (Pet. App. 3a–4a, R. 47, 51, 52; Tr. 46, 49–50, 95–100, 102–103).

When petitioners fixed a deadline by which IBEW would terminate its contracts with Ets-Hokin throughout the country if Rose were not taken off the Glen Canyon project, Ets-Hokin capitulated and terminated the subcontract with Rose (Pet. App. 3a, R. 52; Tr. 36–39, 50–52, 63, 269–270).[3] Following the termination, Ets-Hokin performed the previously subcontracted work itself, using employees hired through the Local 769 hiring hall (Pet. App. 3a, R. 53; Tr. 59). Ets-Hokin also entered into a bargaining agreement with Local 769 which contained the standard clause providing for termination if work were subcontracted to a non-IBEW contractor (R. 53; G.C. Exhs. 6 and 7, p. 9).

The Board found that the contract clause precluding Ets-Hokin from subcontracting to non-IBEW

[2] At this time, Ets-Hokin had no contractual relations with Local 769; however, it had contracts with other IBEW locals in other parts of the country, and with IBEW Local 640, the predecessor of Local 769, in the Glen Canyon area (R. 47, 48, 123 n. 14; Tr. 82).

[3] In settlement of the subcontract, Ets-Hokin paid Rose $50,000, plus a "generous" price for its equipment (R. 52; Tr. 237, Ets-Hokin Ex. 1–13).

contractors violated Section 8(e) of the Act. It concluded that the subcontracting clause was not protected by the construction industry exemption from the general proscription of Section 8(e) because the provision giving IBEW and its locals the right to cancel all IBEW contracts in the event of a breach of the subcontracting clause authorized the union to secure compliance with the boycott agreement by a coercive means that was prohibited by Section 8(b)(4) (Pet. App. 20a–28a). The Board further found that petitioners violated Section 8(b)(4)(ii)(A) and (B) of the Act by threatening Ets-Hokin with termination of its IBEW agreements, because such pressure was exerted for the purposes of forcing Ets-Hokin to enter into an agreement prohibited by Section 8(e), and of causing Ets-Hokin to cease doing business with Rose (Pet. App. 24a–26a).[4] The Board ordered petitioners to cease and desist from the violations found and to post appropriate notices (Pet. App. 27a–28a). The court of appeals sustained the Board's findings and conclusions and enforced its order (Pet. App. 1a–14a).

ARGUMENT

Section 8(e) of the Act, added in 1959, proscribes so-called "hot cargo" agreements, under which an employer agrees not to do business with another person (usually because of that other person's labor relations). Under a proviso to Section 8(e), however, such an agreement in the construction industry, inso-

[4] Member Fanning dissented from the Board's unfair labor practice findings, and would have dismissed the complaint in its entirety (Pet. App. 28a–34a).

far as it relates to on-site work, is not illegal; therefore, a construction industry contractor may agree with the union not to subcontract work to be performed on the job site to a non-union contractor. The Board and the court below correctly determined that, defining the scope of the construction industry proviso in the context in which Section 8(e) was enacted, the proviso did not authorize petitioners' agreements and actions.

Prior to 1959, when hot cargo agreements were not themselves illegal in any industry, the union could seek enforcement of the contract in the courts if the employer breached the hot cargo agreement. But the union could not attempt to secure compliance with the agreement by inducing the employees of the general contractor to strike, for such conduct was a forbidden means of effecting a secondary boycott under Section 8(b)(4)(A) (now 8(b)(4)(i)(B)). See *Local 1976, United Brotherhood of Carpenters* v. *National Labor Relations Board (Sand Door)*, 357 U.S. 93; *National Labor Relations Board* v. *Denver Building Council*, 341 U.S. 675.

The 1959 Landrum-Griffin amendments embodied a significant shift in federal labor policy in opposition to secondary boycotts. Congress not only enlarged the neutral secondary employer's protection from coercive conduct under Section 8(b)(4) (see *infra*, p. 8), it also declared in a new Section 8(e), that boycott agreements themselves constitute unfair labor practices and are unenforceable. Although a special exemption was made for agreements governing on-site work in the construction industry, Congress did not intend to allow construc-

tion-trade unions to interpose such agreements in defense of coercive conduct against the employer which violated Section 8(b)(4).[5] It is reasonable to conclude that Congress likewise did not intend by this narrow exemption to validate hot cargo agreements which authorized in advance, and thus encouraged, such prohibited means of enforcement. Accordingly, if the "all union" agreement in this case, for example, had specifically provided that, in the event of a breach, the employees of the general contractor could strike, the agreement would clearly fall outside the proviso exemption because it would clearly sanction a form of economic coercion prohibited by Section 8(b)(4) of the Act.

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[5] As Senator Kennedy explained:

> This proviso affects only section 8(e) and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* (341 U.S. 675) and the *Moore Drydock* (92 N.L.R.B. 547) cases would remain in force. * * * Since the proviso does not relate to section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under section 8(b)(4) whenever the *Sand Door* case (357 U.S. 93) is applicable. It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the legality of a strike to obtain such a contract. [II Leg. Hist. of the Labor-Management Reporting and Disclosure Act of 1959, 1433.]

And Senator Goldwater added:

> * * * [A]lthough employers and unions who are under this exemption may lawfully enter into such agreements, and may resort to the courts for their enforcement under applicable principles of contract law, no coercion or restraint—economic or otherwise—may be used by any party to such agreement * * * to compel the other party to live up to the contract or to refrain from breaching it. [II Leg. Hist. (1959) 1858.]

The termination provision in this case, which permitted the union to terminate the entire collective bargaining agreement in the event of a breach of the subcontracting clause, similarly authorized an impermissibly coercive means of securing adherence to the clause. Under the 1959 amendments, Section 8(b)(4) not only bars strike pressure against a neutral secondary employer (subparagraph (i)), but also other forms of restraint and coercion directed against such employers (subparagraph (ii)). See *National Labor Relations Board* v. *Servette,* 377 U.S. 46, 53–54. A termination of the entire collective agreement would automatically deprive the contractor of all the advantages which flow from a contract for a fixed term. In addition, collective bargaining contracts which demonstrably contemplate unilateral termination are particularly inharmonious with federal labor policy and the purposes of the Act, which seek to avoid labor strife through a collective bargaining process which will provide some stability in union-management relations.

The union's threat to terminate the contract—a potent form of economic coercion against the employer where only one contract is involved—was accentuated in this case by the fact that the other IBEW locals had the same subcontracting clause in their agreements with Ets-Hokin. Thus petitioners threatened Ets-Hokin that its failure to remove the non-IBEW subcontractor on the Glen Canyon project would result in the termination of its collective bargaining agreements in other parts of the country as well. In these circumstances, the Board properly

concluded that the subcontracting clause violated Section 8(e), since it was enforceable by a prohibited means of economic coercion, and that petitioners' threatened exercise of the termination provision to cancel the contractor's agreements throughout the country constituted a separate violation of Section 8(b)(4).

The decision of the court of appeals sustaining the Board's conclusions accords with that of the only other court of appeals which has considered a similar contract provision, *National Labor Relations Board* v. *Muskegon Bricklayers Union No. 5*, 378 F. 2d 859 (C.A. 6); see also *Orange Belt District Council of Painters No. 48* v. *National Labor Relations Board*, 328 F. 2d 534, 537 (C.A.D.C.),[6] and is consistent with principles announced by this Court. Petitioners' contention that the threatened termination of the contractor's labor agreements is not comprehended by Section 8(b)(4) finds no support in either *National Labor Relations Board* v. *Drivers Local Union No. 639*, 362 U.S. 274, or *National Labor Relations Board* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175. Those cases involved the issue of what constitutes union restraint and coercion of employees within the meaning of

[6] In *National Labor Relations Board* v. *Local 217, United Ass'n of Journeymen*, 361 F. 2d 160, 162–163 (C.A. 1), the court, although agreeing that the construction industry proviso to Section 8(e) "does not legalize an agreement which purports to authorize conduct in violation of Section 8(b)(4)" (citing *Sand Door*, *supra*), held that the subcontracting clause in that case did not exceed the limits of the proviso because the contract on its face, unlike the contract here, did not invariably contemplate union (as opposed to employee) refusal to work. See *Muskegon*, *supra*, 378 F. 2d at 864.

Section 8(b)(1)(A) of the Act. The instant case presents the quite different question whether a union's threats against an employer to secure compliance with a secondary boycott agreement constitute the type of threats or coercion prohibited by Section 8(b)(4). The rationale adopted in *Local 1976, United Brotherhood of Carpenters* v. *National Labor Relations Board* (*Sand Door*), 357 U.S. 93, and *Local Union No. 48 of Sheet Metal Workers* v. *Hardy Corp.*, 332 F. 2d 682 (C.A. 5) support the distinction drawn by the Board and the court below between judicial enforcement of lawful secondary agreements and the use of self-help to enforce such agreements through economic coercion.[7]

The Board and the court below properly rejected petitioners' contention that, since rescision is a traditional contract remedy for a material breach, contractual termination clauses must be viewed as the equivalent of judicial enforcement of secondary agreements. In view of the strong policy against dislocation of union-management relations, it is at least very doubtful whether a court would adopt a contract remedy directing cancellation of all Ets-Hokin's collective

[7] At the time the *Sand Door* case was decided, Section 8(b)(4)(A) of the Act prohibited a union from inducing employees to strike for a secondary object, but direct coercion by the union of the neutral employer was not prohibited. This loophole was closed with the enactment of the new Section 8(b)(4)(ii)(B) in 1959 (see *supra*, p. 8). Consequently, much of the language quoted by petitioners from the *Sand Door* decision, concerning the scope of the proscription on union economic pressure, is now obsolete (Pet. 11–12), as is the quotation of Representative Thompson's remarks concerning the law prior to the 1959 amendments (Pet. 9).

bargaining agreements with IBEW locals throughout the country merely because Ets-Hokin had engaged a non-IBEW subcontractor on one construction project. Cf. *Local Union No. 721, United Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247. In any event, as the court below properly noted (Pet. App. 8a), even if a court might find that rescision of the contract was an appropriate remedy in the circumstances of a particular case, it is another matter for a union to reserve to its own discretion the right to employ such a sanction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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